



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

B-220113

February 28, 1986

The Honorable Helen Delich Bentley
House of Representatives

Dear Mrs. Bentley:

In a letter dated August 22, 1985, you joined with Representative Roy Byson and Representative Marjorie S. Holt in asking that the General Accounting Office investigate the propriety of the Department of the Air Force's award of a \$3.8 million contract to Pacific Car & Foundry Company (PACCAR) on August 16, 1985. The contract is for the design, fabrication, and testing of three prototype strategic weapons loaders (SWL), also called munitions lift trailers (MLT), to support B-1B aircraft.

You indicate that the Air Force reprogrammed funds for this project in direct defiance of the Congress' repeated refusal to authorize such a reprogramming. You refer to the Joint Senate-House Conference Committee on the 1986 Defense Authorization bill which you say expressly denied the Air Force permission to proceed with the new SWL development. In view of the foregoing, you are of the opinion that the Air Force ignored the intent of the Congress and violated the mutual trust which is vital to the passage of defense-related legislation. Also, you view the Air Force's contract award as raising serious constitutional questions regarding the separation of powers between the Congress and the Executive branches of the Federal Government.

In addition to investigating this matter, you asked that we request the Secretary of Defense to cease all activity relating to the development and production of a new lift trailer.

For the reasons stated below, we do not agree that the Air Force's award of a contract to PACCAR for the development, design, and testing of prototype strategic weapons loaders violated any appropriation act or other law or the Department of Defense reprogramming procedures. Although the Air Force's actions were certainly not consistent with the wishes of the House Committee on Armed Services, the Committee's views were never enacted into law. Moreover, the Air Force did not reprogram in order to fund the contract. Instead, it used funds available within the same program element. Absent an unauthorized expenditure, we see no indication of any violation of the separation of powers between the Congress and the Department of the Air Force.

The Air Force entered into a contract with PACCAR on August 16, 1985. The company's duties include the design of a strategic weapons loader and the fabrication and testing of three prototype units. The total amount to be paid to PACCAR is \$3,826,138.04. The contract provides that \$1,300,000 is presently available for payment and allotted to the contract. It further states that it is anticipated that from time to time additional funds will be allotted to the contract until the total price is allotted.

On August 28, 1985, we wrote to the Secretary of the Air Force, explaining that we had a congressional request for a legal opinion on the propriety of the contract award to PACCAR and noting that the requestor asked that he halt all research, development, and testing under the contract until our opinion was rendered. Also, in accordance with our usual practice, we requested the Air Force's views on the contract award. In reply, we received a letter dated September 30, 1985, from the cognizant Assistant General Counsel of the Air Force. He indicated that performance of the recently awarded contract would continue. The Air Force letter explained that the contract was funded by reprioritization within the Armament/Ordnance program element and not by reprogramming funds from the Air Launched Cruise Missile program element, which had been objected to by the House Committee on Armed Services.

We have provided a chronological summary of the key congressional events pertaining to this request as an appendix to this letter.

Discussion

At least since 1983, the issue of which model is the best loader for the newest strategic bombers has been before both houses of the Congress. The FY 1985 and 1986 Air Force budget submissions referred to the development of a "simplified" loader. In brief, the Senate Committee on Armed Services generally has favored a new loader while the House Committee on Armed Services has supported the use of the modified MHU-173 lift trailer. The House Committee believed that development of a new trailer was unwarranted and not cost effective. After the Senate Committee requested the Air Force to explain its plans for the sole-source acquisition of a modified MHU-173, the Air Force undertook a competition for a new simplified loader. Despite opposition to this competition from the House Committee on Armed Services, section 112 of the DOD Authorization Act for FY 1985 provided that no funds could be used for procurement of a new loader until a contractor had been determined by competition. Subsequently, PACCAR was selected as the winner of such a competition.

The Air Force's request for the reprogramming of \$3.8 million for the PACCAR contract was rejected by the House Committee on Armed Services. Under the proposed reprogramming, the necessary funds would have been shifted within the FY 1985 RDT&E account from the Air Launched Cruise Missile program element to the Armament/Ordnance program element, but, in accordance with DOD Directive 7250.5, the planned reprogramming was dropped in view of the disapproval of the House Committee on Armed Services. Subsequently, the Air Force provided \$1.3 million in FY 1985 funds for the PACCAR contract by shifting priorities and funds within the Armament/Ordnance program element itself. The balance needed to complete the project was expected to be paid from FY 1986 funds.

While certain increases in RDT&E program elements totals are considered "reprogramming" under DOD Instruction 7250.10, funding changes within program elements are not regarded as "reprogramming." Funding changes within program elements are often necessitated by delays in contract performance, or increases due to changed priorities. These changes usually are considered to be minor and uncontroversial although this was not true in this case.

When funding was denied by means of reprogramming from another program element to Armament/Ordnance, an alternate way of using funds within the Armament/Ordnance program element was found. The applicable DOD Directive and Instruction do not require approval or notice concerning this kind of action.

The Air Force action, while not subject to reprogramming controls and not legally impermissible, was nevertheless taken in spite of the reprogramming denial by the House Committee on Armed Services. However, we cannot say that the Air Force award of a contract to PACCAR was contrary to the will of the Congress, as expressed in prior legislation. (See earlier discussion of section 112 of the DOD Authorization Act for FY 1985.) It is true that the Conference Committee on the FY 1986 DOD Authorization Act, on July 29, 1985, deleted a provision authorizing the release of prior year funds for the competition winner's development of an MLT. A similar action was taken earlier in the month, on July 2, by the Conference Committee on the supplemental appropriations bill for FY 1985. However, the reason given for deletion of the funds was not disapproval of the MLT program. The conferees explained that the proposed language was unneeded since adequate funds already were available for this program. In any event, no prohibition was placed in either Act to restrict funding of the PACCAR contract. Absent a statutory restriction, there is no legal bar to funding the contract from available RDT&E

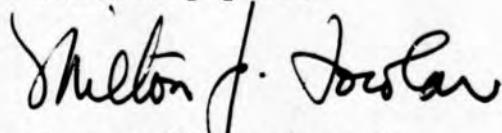
funds. Further, the use of previously designated funds from the Armament/Ordnance program element was not in violation of DOD procedures.

Conclusion

In our opinion the Air Force's award of a contract to Pacific Car & Foundry Company for the development, design, and testing of prototype strategic weapons loaders did not violate any appropriation act or other law nor was it contrary to Department of Defense reprogramming procedures. Absent an unauthorized expenditure, we see no indication of any violation of the separation of powers between the Congress and the Department of the Air Force.

With the approval of your staff, a copy of this opinion is being sent to the Chairman of the House Armed Services Committee, the Chairman of the Committee's Subcommittee on Research and Development, the Chairman of the Senate Armed Services Committee, and to the Air Force.

Sincerely yours,



Acting Comptroller General
of the United States

APPENDIX

Chronological Summary of Congressional Events

On July 5, 1983, the Senate Committee on Armed Services in its report on S. 675, the Omnibus Defense Authorization Act, 1984 (S. Rep. No. 174, 98th Cong., 1st Sess. 96), referred to Air Force plans to convert the loader used for B-52 aircraft to use for the B-1B bomber. It requested a report explaining the reason for a sole-source acquisition for this purpose, as compared to the operational, maintenance and cost factors of a competitive design and procurement.

On January 30, 1984, the Director of Legislative Liaison for the Air Force wrote to the Chairman of the House Committee on Armed Services about the planned release of a Request for Proposal for the development and testing of a new simplified MLT for B-1B aircraft. He indicated that this was being done because of less than satisfactory field experience with the MHU-173 trailer currently deployed with B-52G aircraft. About \$4 million of Fiscal Year 1984 Research, Development, Test and Evaluation (RDT&E) funds would be internally reprogrammed to the Armament/Ordnance Development Program for the development of an alternative lift trailer. It was anticipated that a modified MHU-173 MLT or a design derivative would figure prominently in the competition and evaluation.

On February 7, 1984, the Chairman and the Ranking Minority Member of the House Committee on Armed Services responded by requesting a deferral of the obligation or expenditure of any funds for this purpose, pending the completion of the Committee's evaluation of the MHU-173 system. It was explained that it was not the Committee's policy to initiate new programs through reprogramming actions, absent an urgent requirement.

On April 19, 1984, the House Committee on Armed Services reported on H.R. 5167 the Department of Defense (DOD) Authorization Act, 1985. The Report (H.R. Rep. No. 691, 98th Cong., 2d Sess. 167-8) stated that a competitive program to develop a new trailer was unwarranted and not cost effective, and directed that no funds authorized for appropriation by this bill be used for the design, development or procurement of a new lift trailer. Nevertheless, section 112 of H.R. 5167 as finally enacted, Pub. L. No. 98-525, 98 Stat. 2492, 2507, October 19, 1984, did not put that prohibition into the law. Instead, it provided that:

"None of the funds appropriated to the Department of Defense may be obligated or expended for procurement of a new strategic weapons loader to meet the performance requirements for the B-1B bomber aircraft or the Advanced Technology Bomber aircraft until a contractor for such weapons has been determined after a competition." (Emphasis added.)

In the Conference Report on Pub. L. No. 98-525, H.R. Rep. No. 1080, 98th Cong., 2d Sess. 246 (1984), the conferees stated their understanding that the winning design for the new SWL would be evaluated against the modified MHU-173 design to determine which would be best. According to the report, "The results of this evaluation, and the rationale for the selected approach, will be reported to the Senate and House Armed Services Committees prior to the initiation of MLT procurements."

On December 7, 1984, the Air Force's Director of Legislative Liaison wrote to the Chairman of the Committee on Armed Services of the House of Representatives. He stated:

"The Air Force has completed its competition for the new MLT, and Pacific Car & Foundry Company of Seattle, Washington was selected as the winner. The Air Force has also completed its evaluation of the winning design for the MLT against the modified MHU-173 design, with the result that the design for the new MLT was determined to best accommodate the long term needs of the strategic bomber force."

The letter explained the rationale for selecting the new MLT over the modified MHU-173 design. It also stated that the Air Force was reprogramming \$3.8 million as indicated in its letter to the House Armed Services Committee of January 30, 1984, and that the Air Force intended to award a contract to PACCAR by December 14, 1984.

On December 10, 1984, the Chairman of the House Armed Services Committee responded by advising that the Committee did not concur with the planned reprogramming of \$3.8 million to initiate the new program because its concerns had not been fully addressed in the December 7 letter.

On May 13, 1985, the Deputy Secretary of Defense again submitted reprogramming action FY 85-67PA for the Air Force's Research, Development, Test and Evaluation Appropriation

Account for Fiscal Year 1985. Under the proposed action, \$3.8 million was to be deducted from Air Launched Cruise Missile funds, and added to Armament/Ordnance Development for the new MLT. It was explained that the reprogramming action was submitted for prior approval because it affected an item that had been designated as a matter of special interest to one or more congressional committees.

On May 23, 1985, the Chairman of the House Committee on Armed Services notified the Deputy Secretary of Defense that the Committee had disapproved the reprogramming request.

The Conference Report on H.R. 2577, making supplemental appropriations for FY 1985, H.R. Rep. No. 236, 99th Cong., 1st Sess. 30 (July 2, 1985) deleted a Senate provision which would have made \$3.8 million available for the simplified MLT program. The report stated:

"The conferees agree the proposed language is not required since adequate funding is available for this program for which competitive selection was mandated by section 112 of the Department of Defense Authorization Act, 1985* * *."

Consequently, the Supplemental Appropriations Act, 1985, Pub. L. No. 99-88, 99 Stat. 293, enacted on August 15, 1985, contained no reference to the simplified MLT program.

The Conference Report on S. 1160, the DOD Authorization Act, 1986, H.R. Rep. No. 235, 99th Cong., 1st Sess. 402 (July 29, 1985), deleted a provision in the Senate bill that authorized the release of prior year funds still available for obligation, for the development of the MLT by the winner of the competition mandated by section 112 of the FY 1985 DOD Authorization Act. The House amendment of the bill did not contain this provision. As enacted, the authorization bill, Pub. L. No. 99-145, 99 Stat. 583, November 8, 1985, contains no reference to the use of prior year unobligated balances for the development of a simplified MLT.